Supreme Court, U.S.
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No. 85-2100

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

GERALD GORDON

Petitioner,

v.

VETERANS ADMINISTRATION

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Gerald Gordon
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Petitioner Pro Se

June 10, 1986

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QUESTION PRESENTED FOR REVIEW

1. Does the Civil Service Reform Act of 1978 permit management in Federal agencies to operate without performance standards for employees and without the requirement to advise/inform employees regarding expected performance?

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
(CAFC - Case No 85-2733)

The petitioner, Gerald Gordon, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered on February 5, 1986.

OPINION BELOW

The Court of Appeals entered its decision on February 5, 1986 denying Petitioner's motion to reverse the Merit Systems Protection Board's decision to sustain petitioner's removal. A copy of the decision is attached as Appendix A.

The Court then denied petitioner's petition for rehearing on April 1, 1986. A copy of the order is attached as Appendix B.

JURISDICTION

On February 3, 1986 and April 1, 1986 the U.S. Court of Appeals for the Federal Circuit rendered judgments (Appendices A and B) denying petitioner's motion to reverse the decision of the U.S. Merit Systems Protection Board which affirmed his removal from employment by the Veterans Administration on October 30, 1981 for alleged unsatisfactory performance. The jurisdiction of this Court is

invoked in accordance with Rule 17 of the Supreme Court of the United States in that there is still a conflict between these Courts with regard to the basis for this action, involving the rights and responsibilities of Federal managers and supervisors in adverse actions such as this removal.

CONSTITUTIONAL ACT INVOLVED

The Civil Service Reform Act of 1978 has been interpreted to permit adverse actions under either Chapter 43 or Chapter 75.(1) However, there is still basic disagreement between the U.S. Merit Systems Protection Board (MSPB) and the U.S. Court of Appeals for the Federal Circuit (CAFC) with regard to the larger question addressed by the Civil Service Reform Act, namely the rights and respon-

(1) Supreme Court, 85-882, Lovshin v. Department of the Navy

sibilities of Federal managers and supervisors. The MSPB correctly asserts that Federal managers, while having the right not to be stifled in adverse actions, have the responsibility of (1) operating under objective performance standards, and (2) advising/informing employees regarding expected performance.

STATEMENT OF THE CASE

On July 11, 1985 the Merit Systems Protection Board (MSPB), having denied the Veterans Administration's petition arguing against jurisdiction in petitioner's case, denied the petitioner in his attempt to have the Agency's removal action reversed on the merits of the case. Subsequently, on September 19, 1985 the petitioner appealed to the Court of Appeals for the Federal Circuit (CAFC) for review of the MSPB decision denying his appeal. This petition to the CAFC was denied on February 5, 1986 and a

petition for rehearing was denied on April 1, 1986. The September, 1985 petition to the CAFC was a refutation of the validity of each of the cases cited by the MSPB as precedent for the petitioner, as well as a complaint about numerous procedural errors by the MSPB. A significant aspect of the petition was a refutation of the MSPB's reference to Gende v. Department of Justice, 23 MSPB 604 (1984) as a precedent since petitioner, even as a layman with regard to the law,(2) noted that the MSPB itself, in Gende, had appeared to determine that performance - based Ch.75 actions effected after October 1, 1981 were void, unless there was some misconduct

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(2) Petitioner, since 1982, has been proceeding without benefit of legal counsel of any kind, for lack of ability to pay, primarily because of the unjustified removal action.

involved.(3) The petitioner's Gende comment is located in lines 13 to 19 of page 6 of his 13 page, September 19, 1985 original petition to the CAFC (Appendix C). Furthermore, the relevance of this comment was escalated in the counsel for the respondent's November 8, 1985 response brief, in paragraph 4, page 12 of the 17 page response brief by the Department of Justice (Appendix D). In this brief the respondent raised the reference to Lovshin v. Department of the Navy, 767 F 2d 826 (Fed. Cir. 1985) (en banc) and demonstrated awareness of this CAFC decision, which went counter to the MSPB's Gende decision, asserting that the Agency was not obliged to proceed under Ch.43 in Lovshin's November, 1981 removal for unsatisfactory performance.

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(3) Never an issue in this petitioner's case.

Subsequently, the petitioner, in his response brief of November 29, 1985, denied the respondent's charge that petitioner had insisted that the agency was obliged to proceed under CH.43 (in lines 1 to 15 of page 12 of the 16 page brief - Appendix E). Petitioner wholeheartedly supports the position taken by the CAFC in Lovshin and so affirmed in the November 29th response brief (again, Appendix E) with regard to easing removal procedures for the betterment of Federal service. However, there needs to be safeguards against either Chapter being abused or subverted by the occasional unscrupulous manager(s) who could and would remove satisfactory job performers under any pretext, operating under motives not related to their employees' job performance or personal conduct. This need was recognized in the Civil Service Reform Act by the establishment of the

MSPB and its Office of the Special Counsel. To automatically sanction any agency supervisor's claim that an employee's removal would be "good for the service" without the identification of true performance deficiencies is neither justice nor good for the service (agency). This also applies to the granting of complete deference to the supervisor's testimony over any other. This is tantamount to equating "deference" with "whitewash".

REASON FOR GRANTING THE WRIT

Petitioner is of the understanding that he can appeal the CAFC decision in his case to the Supreme Court only if there appears to be a conflict between lower Courts. Just such a situation exists here in the conflict between the CAFC and MSPB in the Lovshin and Gende cases. Like Lovshin, this petitioner's removal action was effected after October

1, 1981; Lovshin in November, 1981, and this petitioner on October 30, 1981. Petitioner has no knowledge of the Lovshin case other than that, like this petitioner, he was never working under OPM - approved performance standards and was removed under Ch.75 rather than Ch.43 after October 1, 1981. However, in this case, this petitioner was not working under any performance standards.

Petitioner wholeheartedly concurs with the MSPB argument to the Supreme Court that the intent of Congress was to enable federal workers to be "hired and fired more easily, but for the right reasons". Therefore the intent of Congress was to (1) provide some protection for the federal employee against the occasional incompetent, prejudiced, or vindictive supervisor or manager who might abuse a loose system with no objective performance standards, and (2) pro-

vide federal workers with the chance to improve their performance to avoid removal. To this petitioner these are the key issues. Failure to implement this intent would truly be retrogressive and self-defeating.

A perfect example of what can happen when objective standards, of which both the employee and supervisor are aware, are not required, indeed occurred to this petitioner during the 1980-1981 period in question. The supervisor acquired some statistics from the Veterans Administration (VA) Central Office on the average time for servicing (performing full Psychological counseling) veterans and processing their counseling cases by the VA Counseling Psychologists. This data was never made known to the petitioner or any of his colleagues by the supervisor. This was admitted by the supervisor (and the Agency) in a hearing before an MSPB

Presiding Official. The supervisor then applied these statistics, with no relationship to type or volume of caseload, to the petitioner, as a major factor in his removal by stating that he was either above or below average at various time frames. This was done even though these statistics showed (to independent experts) the petitioner to be performing more thoroughly, yet in a timely fashion, then most of his colleagues. The supervisor painted this as evidence of poor performance, claiming lack of timeliness on the part of the petitioner. This was taken up by the agency counsel, MSPB, and CAFC as part of "substantial" evidence of poor performance, despite countering testimony by the petitioner, an expert witness, and some of the clients (veterans) themselves. What is most important is that the supervisor admitted in the hearing that he acted secretly.

Knowledge of (even improper) "standards" would give the employee an opportunity to perform as expected. Without standards there can be no merit or appraisal system; and even if described as a system, it can easily be subverted. Beyond this, lack of standards weakens the ability of the work activity to achieve its goals, increases operating costs to the Government, and is very detrimental to productivity.

Since the MSPB has claimed that the Lovshin decision "contravenes the Civil Service Reform Act" and that the case is "the most important decision to date interpreting the Civil Service Reform Act of 1978", petitioner feels he is on firm ground petitioning the Supreme Court on an issue in this case that is still unresolved. This is the issue of whether or not Federal managers, under Ch.75 or Ch.43, have the responsibility of (1)

operating under objective or reasonable performance standards, and (2) advising/informing employees regarding expected performance.

CONCLUSION

For the foregoing reasons, petitioner Gerald Gordon respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

Gerald Gordon

Gerald Gordon
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June 10, 1986

CERTIFICATE OF SERVICE

I hereby certify I sent three (3) copies of the foregoing Petition for Writ of Certiorari by regular mail this date to the following:

COUNSEL FOR THE RESPONDENT

Mr. David Cohen
Director, Commercial Litigation Branch
Civil Division
Department of Justice
Washington, D.C. 20530

Dated: June 11, 1986

Gerald Gordon

Gerald Gordon

APPENDIX A

Appeal No. 85-2733

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

GERALD GORDON,

Petitioner,

v.

VETERANS ADMINISTRATION,

Respondent.

DECIDED: February 5, 1986

Before FRIEDMAN, Circuit Judge, COWEN, Senior Circuit Judge, and BENNETT, Circuit Judge.

PER CURIAM.

DECISION

The final decision by the Merit Systems Protection Board (board), 28 M.S.P.R. 258 (1985), sustaining petitioner Gordon's removal by the Veterans

Administration for unsatisfactory performance, is affirmed.

OPINION

Petitioner was removed from his position effective October 30, 1981, and on that same day Gordon resigned. The presiding official sustained removal. However, the board dismissed the appeal for lack of jurisdiction because the resignation on the effective date of removal presented the board with a separation based on resignation rather than a removal for unsatisfactory performance.

Gordon initially raised the issue of the voluntariness of his resignation to this court. We granted the board's motion requesting a remand for its determination on the voluntariness issue. The presiding official concluded that the resignation was involuntary, which rendered the removal an adverse action within the board's jurisdiction. The

board then upheld both the initial decision sustaining removal on the merits and the decision of involuntary resignation.

Petitioner contends, inter alia, that his sustained removal was an abuse of discretion by the presiding official. However, petitioner fails to reconcile his contentions with facts to refute the decision. The presiding official determined from testimony and documentary evidence that Gordon's performance was inadequate. The court accords deference to an agency's determination of witness credibility or noncredibility. De Sarno v. Department of Commerce, 761 F.2d 657, 661 (Fed. Cir. 1985). Further, the agency action will be upheld if "it has a rational basis supported by substantial evidence from the record taken as a whole." Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

We cannot say that the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. §7703(c) (1982). Therefore, based upon our standards of review and a careful study of the records we find substantial evidence sustaining Gordon's removal. Petitioner has failed to demonstrate harmful procedural error which would vitiate the decision.

APPENDIX B

Appeal No. 85-2733

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

GERALD GORDON,

Petitioner,

v.

VETERANS ADMINISTRATION,

Respondent.

Before FRIEDMAN, Circuit Judge, COWEN, Senior Circuit Judge, and BENNETT, Circuit Judge.

ORDER

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is ORDERED that the petition for rehearing be, and the same hereby, is denied.

FOR THE COURT

/S/ Francis X. Gindhart
Francis X. Gindhart, Clerk

Dated: April 1, 1986

APPENDIX C

FROM SEPTEMBER 19, 1985, ORIGINAL PETITION TO CAFC
(Page 6 of 13)

In any event, it is appellant's understanding that in Gende, the MSPB stated that a performance-based Chap. 75 action effected after October 1, 1981, was void unless the agency showed that the action was based at least partly on misconduct. This would seem to preclude the agency's action notwithstanding its lack of merit on a true evaluation of the appellant's performance. However, appellant wishes the Court to bear in mind that he is not making this issue the core of his appeal, as he is not an attorney and may not understand all of the implications of Gende.

APPENDIX D

FROM NOVEMBER 8, 1985, RESPONSE BRIEF
BY THE DEPARTMENT OF JUSTICE
(Page 12 of 17)

4. Petitioner's remaining allegations of procedural error are without merit. Petitioner's allegation that the agency was obliged to proceed under chapter 43 rather than chapter 75, Pet. Br. 6, should be summarily rejected in light of this Court's decision in Lovshin v. Department of the Navy, 767 F.23d 826 (Fed. Circ. 1985) (en banc).

APPENDIX E

FROM NOVEMBER 25, 1985, RESPONSE BRIEF
BY THE PETITIONER
(Page 12 of 16)

Lovshin v. Department of the Navy, 767 F. 2d 826 (Fed. Cir. 1985)

Respondent totally mis-states appellant. Appellant never insisted that the agency was obliged to proceed under Chapter 43 rather than Chapter 75. He specifically reiterated, and not for the first time, that he is a layman regarding the law. In this instance, he specifically stated that, as such, he may not understand the implications of Gende, a related case. Appellant wholeheartedly concurs with the CAFC that when incompetent employees are allowed to stay on the work rolls, the dedicated and competent employee must increase his workload so that the public may benefit. However, appellant notes that incompetent employees may sometimes be vindictive,

1st level supervisors, who with the blessing of a similar 2nd level supervisor, may abuse Chapter 75. A merit system must protect both the employee and management. Otherwise, the wheat may be thrown out with the chaff.

85-2100 (2)

APPENDIX F

Docket Number NY07528210052 REM

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GERALD GORDON,

Appellant,

v.

VETERANS ADMINISTRATION,

Agency.

DATE: July 11, 1985

Before Herbert E. Ellingwood, Chairman; Maria L. Johnson, Vice Chair; and Dennis M. Devaney, Member.

ORDER

Having considered the appellant's petition for review 1/ of the initial

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[See footnote on following page]

decision issued on June 10, 1982, and the agency's petition for review 2/ of the January 7, 1985, remand initial decision, we find that they do not meet the cri-

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1/ See Risher v. Department of the Army, 10 MSPB 372, 374 (1982) (argument raised for the first time in a petition for review will not be considered, absent a showing that it is based on new and material evidence not previously available despite due diligence); Karapinka v. Department of Energy, 6 MSPB 114 (1981); (a procedural error by a presiding official is of no legal consequence unless it is shown to have adversely affected a party's substantive rights); Douglas v. Veterans Administration, 5 MSPB 313 (1981) (reasonableness of penalty). Cf. Gende v. Department of Justice, 23 MSPR 604 (1984) (partial retroactive effect of 5 U.S.C. Chapter 43 on performance-based Chapter 75 actions).

2/ Contrary to the agency's contention, the voluntariness of appellant's resignation need not be measured solely against a test requiring duress or coercion. There is no requirement that an employee be intentionally deceived about his options. See Covington v. Department of Health and Human Services, 750 F.2d 937, 942 (Fed. Cir. 1984). See also Scharf v. Department of the Air Force, 710 F.2d 1572, 1575 (Fed. Cir. 1983) (retirement action involuntary if agency made misleading statements on which the employee reasonably relied upon to his detriment.

teria for review set forth at 5 C.F.R. §1201.115. Accordingly, the Board hereby DENIES the petitions.

This is the final order of the Merit Systems Protection Board in this appeal. The decisions shall become final five (5) days from the date of this order. 5 C.F.R. §1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. §7703 to seek judicial review, if the court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the

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court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

/S/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.